

REMARKS

Claims 28, 33, 34 and 45-60 are canceled hereinabove without prejudice or disclaimer. Claims 1-27, 28-32, and 35-44 were previously canceled without prejudice or disclaimer in the first Preliminary Amendment. New claims 61-64 are added, which reflect the exact language of claims 28, 33, 34 and 45 as found allowable in parent application 09/337,946. No new matter is introduced, and an early and favorable action on the merits is requested.

Thus, upon entry of this Preliminary Amendment, all of original claims 1-60 are now canceled, and new claims 61-64 are pending.

In the Office Action dated June 15, 2004, the Examiner set forth a Restriction Requirement. This Preliminary Amendment is believed to be responsive—or at least, is not non-responsive—to that Restriction Requirement because it cancels all of the original restricted claims and adds four new claims 61-64. The explanation for this response is as follows.

Applicant's representative contacted Examiner Chen by telephone on June 29, 2004 to discuss the outstanding Restriction Requirement and explain the history of this continuation application. (The Examiner handling the parent application 09/337,946, Examiner Wortmann, retired subsequent to the filing of the continuation application and Examiner Chen was assigned the continuation application.) In the parent application, claims 28, 33, 34 and 45, limited to VRepEboVP35 due to a previous restriction requirement, were prosecuted until found to be in allowable form by Examiner Wortmann—except for one outstanding objection. Specifically, Examiner Wortmann required that the claimed strain VrepEboVP35 be deposited under the terms of the Budapest Treaty. Applicants attempted to comply, but due to the designation of Ebola as a select agent, were met with delays in acceptance of the deposit by the American Type Culture Collection (ATCC).

As a result, Applicants were unable to get the strain deposited and accepted by the ATCC prior to the expiration of the last possible extension of time in the parent application. In order to maintain pendency of the claimed subject matter while the deposit issued was being resolved, Applicants were forced to file the present continuation application based on the parent application.

In the Preliminary Amendment filed with the continuation application Applicants did not amend claims 28, 33, 34 and 45 as they were allowed in order to delay a first action final rejection (i.e., allowable except for lack of deposit), in the event Applicants needed even more time to get the strain deposited. Actually, the strain has been deposited with the ATCC last fall, but is still in the process of being tested for viability, and apparently these tests are involved and complicated for select agents.


As discussed with Examiner Chen on June 29, 2004, the following course of action was tentatively agreed upon. When the deposit is successfully completed, Applicants will file this Preliminary Amendment in which all the pending claims are canceled, and new claims 61-64 added corresponding to claims 28, 33, 34 and 45 as allowed in the parent case.

On September 14, 2004, the ATCC informed applicants' representative that the deposit has been accepted by the ATCC, and accorded a deposit date and accession number. For purposes of this patent application, on November 13, 2003, strain VRepEboVP35 was deposited with the American Type Culture Collection, located at 10801 University Boulevard, Manassas, Virginia 20110-2209. VRepEboVP35 has been assigned accession number PTA-5649. The deposit was made under the provisions of the Budapest Treaty, and all restrictions imposed on the availability to the public of the deposited material will be irrevocably removed upon the granting of the patent. We submit that the application and claims as pending are now in full compliance with the deposit requirements, as well as the enablement requirements of 35 U.S.C. §112, first paragraph. If the Examiner would like the claims to be amended to include the accession number, we will be happy to attend to this.

Since we are canceling all of the restricted claims, this Preliminary Amendment is not non-responsive to the Restriction Requirement. (If Examiner Chen subsequently finds that this is a problem she is invited to call the undersigned to discuss it.) Because the Patent Office has already expended resources in examining and finding allowable these exact claims in the parent application, and the last remaining issue regarding the deposit has been addressed, we submit that no further action is needed on the part of the Office, and request that the application be immediately allowed.

In summary, all of the outstanding objections of these four claims have been addressed, and the application is believed to be in allowable form. Notice to that effect is earnestly solicited. No amendment made was related to the statutory requirements of patentability unless expressly stated herein, and no amendment made was for the purpose of narrowing the scope of any claim unless we argued above that such amendment was made to distinguish over a particular reference or combination of references.

If the Examiner has any questions or would like to make suggestions as to claim language, she is encouraged to contact Marlana K. Titus at (301) 977-7227.

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